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Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 96-7901

In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court of appeals properly concluded that it was foreclosed from addressing the merits of a habeas claim following its *sua sponte* invocation of procedural default?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner Richard Franklin Trest, an inmate at Louisiana State Penitentiary, is before this Honorable Court on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of his federal habeas corpus proceedings.[1] This Honorable Court's grant of certiorari was limited to the first question presented in the *Petition For Writ Of Certiorari* filed by petitioner's appointed counsel Rebecca Hudsmith. *See also* Appendix A at 5a (hereinafter App. at ___).

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[1] Burl Cain has replaced John P. Whitley as warden for Louisiana State Penitentiary in Angola, Louisiana and is now the respondent in this litigation.

A. Procedural History In State Court

On January 5, 1979, petitioner was indicted by a grand jury for the 26th Judicial District, Parish of Bossier, State of Louisiana, for the offense of armed robbery in violation of La. R.S. 14:64 (West 1978). App. D at 20a. The charge stemmed from the December 26, 1978, armed robbery of Marvis E. Mason, an attendant at B&J Grocery, a store located in Bossier Parish, Louisiana. Record at 88, (hereinafter R. at __). Petitioner, along with an accomplice, pulled and held a gun on Mr. Mason while the accomplice took about $84.00, a wrist watch, and a "blank (starters) pistol" from the victim. R. at 81, 120-124. Petitioner was tried by a 12-person jury during a three-day trial and was found guilty as charged by an 11 to 1 vote on March 29, 1979. R. at 88. At trial, testifying in his behalf, petitioner denied he had a gun but admitted he wanted his victim to believe he was armed. R. 122. Petitioner further testified under oath that he had previously been convicted of five counts of burglary in the State of Mississippi in 1976, had served time for those crimes at Mississippi State Penitentiary, and was paroled on February 2, 1978, after serving two years. R. at 125, 130.

Following the Louisiana conviction for armed robbery, the State of Louisiana on April 19, 1979, filed a bill of information against the petitioner charging him as a second-time felony offender under La. R.S. 15:529.1 (West 1979) based upon his prior five felony convictions for burglary in the State of Mississippi. R. at 83-85. *See also* App. D at 20a-24a. Petitioner pled not guilty to the habitual offender bill and, through trial counsel S. Patrick Phillips, unsuccessfully moved to quash the bill on the basis that its filing was vindictive and violated an alleged

right to a jury trial. *Respondent's Motion To Enlarge The Record* at 30, (hereinafter, R.M. at __).

Following a contradictory hearing in which the State of Louisiana entered its evidence concerning the five prior Mississippi felony convictions, the trial court ruled on June 8, 1979, that petitioner was a habitual offender under the State of Louisiana's recidivism statute. R. at 87-114. *See also Respondent's Supplemental Motion To Enlarge The Record* and attachments included therein. On June 8, 1979, the trial court sentenced petitioner to an enhanced sentence of 35 years imprisonment at hard labor without benefit of probation, parole or suspension of sentence[2] as required by La. R.S. 14:64 (West 1978) and La. R.S. 15:529.1 (West 1979). (R. at 115-117) *See also* App. D at 20a-24a.

I. Direct Review Of Conviction And Sentence

On direct review, the Louisiana Supreme Court[3] affirmed petitioner's conviction and sentence on February

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[2] As is obvious from the record before this Honorable Court, petitioner concedes that he has attacked his Mississippi convictions only so far as their claimed unconstitutional use by the State of Louisiana for enhancing his Louisiana conviction for armed robbery. *See Brief For Petitioner* at 2. While petitioner is incarcerated in Louisiana for a period of 35 years beginning from the date of his sentencing on June 8, 1979, because of good time credits and credit for time served, his actual release date is February 19, 2000. *See R.M.* at 203.

[3] At the time of petitioner's original conviction in 1979, all criminal appeals were made directly to the Louisiana Supreme Court as a matter of the Court's original jurisdiction. Since that time, the Louisiana Constitution has been amended. Today the same appeal would first be presented to the Louisiana Court of Appeal, Second Circuit, with only discretionary review by the Louisiana Supreme Court under its powers of supervisory review. *See* La.C.Cr.P. art. 912.1, as amended by Acts 1980 of the Louisiana Legislature, No.

6, 1980, by summarily denying relief. R.M. at 000-029. The Louisiana Supreme Court denied a February 21, 1980, request for rehearing on March 3, 1980. R. 82. No further review of this judgment was sought.

B. State Post Conviction Relief Proceedings

On February 26, 1981, petitioner, acting *pro se*, filed in state court a petition for writ of habeas corpus[4] wherein he asserted claims related to an allegedly unconstitutional shifting of the burden of proof contained in both a particular jury charge and the prosecutor's closing argument at trial. R. M. at 94-97. The trial court denied this writ application on March 2, 1981. R.M. at

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516, § 1, eff. July 1, 1982, following approval of amendments to La. Const. Art. 5, § § 5, 8 and 10, which were subsequently approved by Acts 1980, No. 843, § 2. *See* App. C at 8a-9a. In Trest's state post conviction relief application filed in state court on January 17, 1990, (the third page) and in his federal habeas application filed in the Western District of Louisiana on September 30, 1991, petitioner maintained that he did not know if he had appealed his conviction and sentence on direct review in Louisiana. Joint Appendix at 29, (hereinafter J.A. at __), and *Petitioner's Motion To Enlarge The Record* at heading No. 3 moving that petitioner's *Motion To Correct Illegal Sentence* filed in state court on January 17, 1990, be filed into the record (hereinafter, P.M. at __). However, in a previous state post conviction relief application filed on October 21, 1983, as discussed *infra*, petitioner knew he had appealed. R.M. at 49. The record now before this Honorable Court indicates that Trest did, in fact, appeal his conviction and sentence, both of which were summarily affirmed by the Louisiana Supreme Court on February 6, 1980, with a request for rehearing denied on March 3, 1980.

[4] Effective January 1, 1981, the State of Louisiana adopted its current scheme dealing with collateral attacks on state convictions with the mandatory use of the Uniform Application For Post Conviction Relief. *See* La.C.Cr.P. art. 924 *et seq.*, App. C at 10a-19a. Such a state habeas proceeding is now commonly referred to as an application for post conviction relief.

97. The trial court judgment became final because the record does not indicate that petitioner sought supervisory review from the Louisiana Supreme Court.

On October 21, 1983, petitioner filed a second *pro se* application for post conviction relief entitled *Application For Writ Of Habeas Corpus* asserting claims related to ineffective assistance of counsel, other crimes evidence and for a second time, a claim relating to the unconstitutional shifting of the burden of proof of a particular jury charge. R.M. at 32-115. These claims were the only claims included in the Uniform Application For Post Conviction Relief. However, in petitioner's supporting memorandum, Trest argued three additional claims for relief relating to the testimony of a witness he claimed had violated the order of sequestration, excessive sentence and patent error.

The State responded by filing its *Answer To Motion For Post Conviction Relief*. R.M. at 35-38. The trial court denied relief on April 18, 1984 and denied petitioner's May 7, 1984, application for a rehearing. R.M. 32-34, 117-119. Petitioner then filed a *Petition For Writ Of Mandamus Or, In The Alternative A Writ Of Prohibition* on September 6, 1994 with the Louisiana Supreme Court, which denied supervisory review on April 1, 1985. R.M. at 101-144, 31. The record does not demonstrate that petitioner sought any further review of the denial of this application.

On January 17, 1990, petitioner filed a third *pro se* application for post conviction relief entitled *Motion To Correct Illegal Sentence*. *See* J.A. at 3-23[5]. In the

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[5] As discussed in Footnote No. 3 *supra*, J.A. refers to the Joint Appendix.

Uniform Application For Post Conviction Relief,[6] petitioner's only claim was that "[t]he entire multiple offender proceedings were in violation of LSA-R.S. 15:529.1." Attached thereto was his memorandum in support of the application. The memorandum detailed nine claims for relief. In claim No. 7, petitioner complains that "[t]he evidence introduced by the state as to prior felony convictions was illegally entered into evidence." In further briefing this claim, the petitioner added two subparts: A and B. In claim 7A, petitioner argued in his brief that the documents used by the State of Louisiana at his habitual offender hearing to prove his prior Mississippi convictions were not certified, and therefore, could not be used to enhance his Louisiana conviction. J.A. at 18. *See also* R.M. at 162.

The substance of his 7B claim was that his Louisiana enhanced sentence was somehow invalid because, at the time of his guilty pleas in Mississippi, he was not informed by the trial judge of an alleged right to appeal or of an alleged right to counsel on appeal, and was not informed of the maximum sentence which could be imposed.[7] J.A. at 19-20. *See also* R.M. at 162-163. The "7B claim" is one of the two claims now before this Honorable Court that petitioner argues to this Court that the Fifth Circuit should have addressed on the merits. J.A. at 10. *See also Brief For Petitioner* at 3, 6 and 9.

The January 17, 1990, application for post conviction relief was denied by the trial court on March

[6] This application for state post conviction relief is the first step in the procedural chain that resulted in this Honorable Court's granting the instant petition for writ of certiorari.

[7] Hereinafter, for the sake of simplicity, these alleged issues for relief raised by petitioner in subpart B of his claim No. 7 will be summarily referred to as the "7B claim."

26, 1990. J.A. at 24-26. The record contains no answer by the State of Louisiana to this petition.[8] On July 13, 1990, petitioner filed an application for *Writ Of Supervisory And/Or Review* of the trial court's denial of his *Motion To Correct Illegal Sentence* with the Louisiana Supreme Court. R. M. at 145, 169. Attached to the application was the identical post conviction relief application and accompanying memorandum which had been submitted to the trial court. R.M. at 146-169. On May 17, 1991, the Louisiana Supreme Court summarily denied review. J.A. at 27, R.M. at 145.

Petitioner then filed a fourth *pro se* application for state post conviction relief entitled *Petition For Writ Of Habeas Corpus* on November 7, 1994. In this application, petitioner, a white male, for the first time challenged the grand jury system in Louisiana claiming

[8] Petitioner correctly notes that the State of Louisiana did not respond to the original state application for post conviction relief filed on January 17, 1990, his third such state court filing. *See Brief For Petitioner* at 3. Under Louisiana law, which was also in effect at the time of Trest's January 17, 1990, post conviction relief application, a trial court will order a district attorney to respond to a state post conviction relief application if, by viewing the petition on its face, the petition establishes a basis for relief, which if established, would entitle the prisoner to relief. In this case, the silent record suggests that the trial judge summarily denied relief without ordering the District Attorney to either make procedural objections or to address the petition on the merits. *See* La.C.Cr.P. art. 927. *See also* App. C at 12a-13a. Further, one could argue that had the District Attorney been ordered to answer, he or she may have successfully argued that the merits of the petition should be procedurally defaulted in that Trest's application was repetitive, and further review would be possibly barred for inexcusably failing to brief the claims earlier. *See* La. C.C.P. art. 930.4. *See also* App. C at 16a-17a. In a subsequent state post conviction filing on November 7, 1994, and discussed *infra*, the District Attorney does lodge a procedural objection on the basis of La.C.Cr.P. art. 930.8. R.M. at 189. *See* App. C at 18a-19a.

that the process of selecting a state grand jury foreman in the 26th Judicial District, Parish of Bossier, State of Louisiana, was racially biased against blacks. Trest claimed that the selection process violated his equal protection rights and that his trial lawyer's performance was ineffective for failing to challenge the discriminatory nature of this selection process. R.M. at 171-184. Following an answer filed by the District Attorney as well as a state *Supplemental Response To Petition Writ Habeas Corpus* filed on November 1, 1994, the trial court denied relief on November 17, 1994. R.M. at 185-189. Petitioner then responded with a *Traverse In Opposition To The State's Reponse* filed on November 18, 1994, which the trial court denied by referencing its earlier reasons for denial of November 17, 1994. R.M. at 190-192.

Petitioner then filed an application for *Writ Of Review* and a supporting brief with the Louisiana Supreme Court on December 29, 1994, wherein he argued the same claims for relief. R.M. at 193-201. The Court summarily denied review on November 15, 1996. R.M. at 170. The record does not indicate that petitioner pursued this application any further.

C. **Federal Habeas Corpus Proceedings**

On September 30, 1991, petitioner filed *pro se* a *Petition Under 28 U.S.C. § 2254 For A Writ Of Habeas Corpus By A Person In State Custody* with the United States District Court, Western District of Louisiana, Shreveport Division. J.A. at 28-36. This petition and supporting memorandum were the identical nine claims for relief alleged in petitioner's *Motion To Correct Illegal Sentence* and supporting memorandum filed in state court on January 17, 1990, upon which relief was denied by the trial court on March 26, 1990, and by the Louisiana

Supreme Court on May 17, 1991. J.A. 24-27. (*Compare* J.A. 28 through 36 to J.A. 3 through 23).

In his federal petition, Trest again raised his No. 7 claim that "the evidence introduced by the state as to prior felony convictions was illegally entered into evidence." J.A. at 37-51. In his memorandum, Trest raised in federal district court the same claim No. 7 and argued the same basis for the "7B claim" as he had argued in state court, to wit: that he was not informed of his alleged right to appeal his guilty pleas, his alleged right to counsel on that appeal and the maximum sentence that could be imposed.

On January 9, 1992, the State of Louisiana responded by filing its *Answer To Application For Writ Of Habeas Corpus* and *Memorandum Of Law In Opposition To Petitioner's Application For Writ Of Habeas Corpus* and attachments. J.A. at 56--67, R. at 68-77, 78-143.[9] On behalf of the State of Louisiana, the District Attorney informs the federal court that petitioner "has exhausted all State remedies, including any post conviction relief available to him under Louisiana law."[10] J.A. at 56. On the merits of the nine claims, but not specifically addressing "the 7B claim", the State of Louisiana contended that petitioner's habitual offender proceedings

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[9] On January 24, 1992, Trest filed a *Motion In Traverse To Respondent's Answer To Writ Of Habeas Corpus*. R. at 145-146.

[10] The District Attorney is presumably responding that Trest had exhausted his state court remedies under Louisiana law in that the nine claims for relief contained in the federal habeas filed on January 17, 1990, were identical to the nine claims of relief presented and denied on March 26, 1990, by the state trial court in a post conviction relief application to which the Louisiana Supreme Court had declined supervisory review on May 17, 1991. Compare J.A. at 9-10 against J.A. at 38-39 and P.M. at subheading 3, *Motion To Correct Illegal Sentence*, attached memorandum of law, page 3.

in Louisiana complied with the minimum due process requirements guaranteed by the Fifth and 14th Amendments to the United States Constitution.

After describing the constitutional requirements of the habitual criminal statute, the federal magistrate concluded in his report that petitioner had exhausted his state court remedies, and that the procedure followed by the State of Louisiana met the due process requirements of the 14th Amendment. J.A. at 67-76, R. at 148-157. The federal magistrate's Report And Recommendation did not address the merits of the "7B claim" raised by Trest in his memorandum to the federal court.

After issuing the Report And Recommendation, the federal magistrate notified the parties that they had ten business days from service of the Report And Recommendation to file specific, written objections with the Clerk of Court for the Western District. J.A. at 75-76, R. 157.

On February 18, 1994,[11] petitioner filed *Objections To Magistrate's Report And Recommendation*. J.A. at 77-83, R. at 199-205. In his objections, petitioner discusses that the federal magistrate had not addressed his previously raised "7B claim". Moreover, Trest expanded his "7B claim" to include an attack on his Mississippi convictions under *Boykin v. Alabama*, 395 U.S. 238 (1969), alleging for the first time that his prior Mississippi guilty pleas were not intelligently and voluntarily made.[12]

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[11] The Joint Appendix indicates that petitioner's objections were filed on February 13, 1994; however, the record indicates that they were filed on February 18, 1994. Compare J.A. at 77 against R. at 223. In light of the fact that the joint appendix is compiled from the record, the correct date would be February 18, 1994.

[12] Hereinafter, as was done in Footnote No. 6, *supra*, for the sake of simplicity, this newly raised claim will be collectively referred to as the *Boykin* claim.

Trest attempted to sweep his new *Boykin* claim in under the pretext that he had previously raised the matter as part of his "7B claim" saying that his claim had been "unskilled and obscurely raised in subsection B of claim 7" and that the magistrate's report had "failed to address this claim." J.A. at 78. In further expanding his newly raised *Boykin* claim, petitioner argues that the Mississippi trial court failed to advise Trest that "by pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers." J.A. at 80. Trest further complained for the first time that "[t]he record indicates that the court advised the two codefendants, but did not (sic) petitioner to these basic rights." J.A. at 80. Up to this point, and as noted *supra* at 7, Trest's "7B claim" dealt solely with the alleged failure by the Mississippi trial judge to advise Trest at the time of his guilty pleas of his alleged right to appeal, his alleged right to counsel on that appeal, and the maximum sentence that could be imposed.[13] In support of

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[13] Petitioner argues to this Honorable Court that his claim concerning the apparently constitutional deficiency in the Mississippi convictions was presented to the state court in Trest's post conviction relief application filed on January 17, 1990, was again presented in the federal habeas petition Trest filed on September 30, 1991, and was again discussed in Trest's objections to the federal magistrate's Report And Recommendation. Petitioner's position is obviously that there was only one claim. *See Brief For Petitioner* at 3-5. The State of Louisiana contends herein that there were actually two claims: the "7B claim" regarding the alleged failure to inform Trest of his alleged right to appeal and alleged right to counsel on that appeal and the *Boykin* claim, which was raised for the first time in Trest's objections to the magistrate's report in that the guilty pleas were not intelligently and voluntarily made. This factual dispute will apparently be a point of contention between the parties in oral argument before this Honorable Court. As *Mele v. Fitchburg District Court*, 850 F. 2d 817, 822 (1 Cir. 1988) demonstrates, there is no "duty to look for a

his newly raised *Boykin* claim, for the first time Trest attached to his objections to the magistrate's report a copy of the plea colloquy from his guilty pleas in *State of Mississippi v. St. Clair Locke, Richard Trest and Tommy Bryant*, Docket Nos. 7841-7845, Circuit Court, April 1976 Term, Jackson County, State of Mississippi, May 24, 1976. R. at 148, 206-222. In his objections, Trest cited to the transcript arguing that the transcript supported his claim that the Mississippi judge had violated his constitutional rights under *Boykin*. In anticipation of a possible challenge that he was attempting to enter new evidence by attaching the transcript, Trest wrote "...The issues presented herein are not new, the claim was properly raised and preserved throughout the course of the post conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obscured, [sic] but nevertheless raised and preserved." J.A. at 83. The District Attorney did not respond to the petitioner's objections.[14]

On May 13, 1994, United States District Judge Tom Stagg issued an order, adopting the federal magistrate's Report And Recommendation, which had denied the petitioner federal habeas relief. R. at 230, J.A. at 84. Without any comment, the Court's order summarily mentions the existence of the petitioner's objections to the magistrate's report, but does not address the objections in any detail. As noted previously, the

needle in a paper haystack." *See also Petrucelli v. Coombe*, 735 F. 2d 684, 689 (2d Cir. 1984), which observed that "federal judges will not presume that state judges are clairvoyant."

[14] On July 7, 1997, the 26th Judicial District Attorney James M. Bullers for the Parish of Bossier, State of Louisiana, requested in writing that the Attorney General for the State of Louisiana, Department of Justice, take over the perfection of the State's response to this Honorable Court. *See* R.M. at 204.

magistrate's Report And Recommendation as adopted by the district court did not address the "7B claim" and obviously was issued prior to petitioner's raising his *Boykin* claim. J.A. at 67-76, 84.

Petitioner filed a *Notice Of Intent To Appeal* on May 26, 1994. R. at 231. Attached thereto was petitioner's application to the United States District Court for a Certificate Of Probable Cause to appeal to the Fifth Circuit for the United States Court of Appeals, and a *Request For A Certificate Of Probable Cause*. R. at 232-233. The district court denied the Certificate Of Probable Cause on June 20, 1994. R. at 234.

Subsequently, on August 16, 1994, petitioner filed *pro se* in the Fifth Circuit for the United States Courts of Appeal an *Appeal Brief Prepared On Behalf Of Richard F. Trest*. R.M. at 205-222. Despite the district court's denial of a Certificate of Probable Cause, the Fifth Circuit construed Trest's notice of intent to appeal as a motion for a Certificate of Probable Cause, and granted the certificate on September 22, 1994.

In his *pro se* appeal brief to the Fifth Circuit, Trest assigned as error all previously raised claims Nos. 1 through 9 that had been presented to the state and lower federal court including Claim No. 7 asking "Whether the court erred allowing (sic) the uncertified Mississippi documents in evidence?" R.M. at 206. In his briefing of Claim No. 7 to the Fifth Circuit, Trest, again as he had done in the state and lower federal court, addressed the "7B claim" in his memorandum and reiterated his claim regarding the failure to be informed by the Mississippi trial judge of his alleged right to appeal, his alleged right to counsel on that appeal and the maximum sentence that could be imposed at the time he entered his Mississippi guilty pleas in 1976. R.M. 219-220.

The District Attorney responded in the Fifth Circuit by filing on November 2, 1994, its *Memorandum In Opposition To Appellant's Appeal From U.S. District Court, Western District Of Louisiana*. R.M. at 223-224. Rather than briefing the matter anew, the District Attorney simply referred the Fifth Circuit to the State's response in federal district court in a two-page response which incorporated the State's previous answer filed with the district court on January 9, 1992. The Fifth Circuit thereafter appointed Federal Public Defender Rebecca Hudsmith as counsel for Trest on May 18, 1995, and ordered supplemental briefing on the issue concerning collateral attacks of prior convictions raised by *Custis v. United States*, 511 U.S. 485 (1994). R.M. at 202, 205-224. Thereafter, both the State of Louisiana and the petitioner submitted supplemental briefs on the merits of *Custis* at it related to the newly raised *Boykin* claim. R.M. 225-252. Oral argument was held before the Fifth Circuit on December 7, 1995. *Brief For Petitioner* at 4.

On September 17, 1996, the Fifth Circuit issued its opinion in *Trest v. Whitley*, 94 F. 3d 1005 (5th Cir. 1996), *sua sponte* invoking procedural default and summarily denying petitioner's habeas application in affirmation of the district court's ruling. In so doing, the Fifth Circuit relied upon its previous decision in *Sones v. Hargett*, 61 F. 3d 410 (5th Cir. 1995), and held it was precluded from reviewing the merits of Trest's habeas claims regarding the constitutional attack on his Mississippi convictions because his petition raised claims that were procedurally barred from federal scrutiny. *Id.* at 1008, J.A. at 90.

On behalf of the petitioner, Ms. Hudsmith on October 1, 1996, requested a rehearing by simultaneously filing a *Petition For Panel Rehearing On Behalf Of The Appellant Richard F. Trest* and *Petition For Rehearing En Banc On Behalf Of The Appellant Richard F. Trest* with attachments, both of which were denied on October 29, 1996. R.M. at 283-303, 254-282, J.A. at 99.

On January 27, 1997, counsel for petitioner applied to this Honorable Court for petition for a writ of certiorari, which was granted for the limited purpose of addressing the first question raised in the petition. App. A at 5a-6a.

SUMMARY OF THE ARGUMENT

1. Based upon the record before it, the Fifth Circuit's *sua sponte* invocation of the procedural bar was correct.

Granberry v. Greer, 481 U.S. 129 (1978), clearly recognized the authority of a federal court to raise a procedural bar despite the State's failure to raise that defense. The *Granberry* Court stressed the necessity of allowing discretion and flexibility to lower courts in determining the advisability of raising a procedural bar or foregoing such a defense in favor of addressing the merits of a claim.

2. The Fifth Circuit, in its discretion, undertook to recognize the Mississippi law in question as an independent and adequate state rule, which once raised, prevented examination of the merits of petitioner's claims. Furthermore, the Court found that petitioner neither alleged cause and prejudice nor a fundamental miscarriage of justice, and therefore, the Court concluded that it was foreclosed from considering the merits of *Trest's* habeas challenge. This decision is consistent with this Honorable Court's procedural default doctrine.

ARGUMENT

I. **The federal court of appeals' *sua sponte* invocation of a Mississippi procedural bar was not an abuse of discretion.**

A. The Fifth Circuit's *sua sponte* invocation of procedural default is consistent with principles announced in *Granberry v. Greer*, 481 U.S. 129 (1987).

The *sua sponte* invocation of procedural default was proper in this case because it served the interests of comity[15] and federalism[16]. Although the Fifth Circuit

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[15] "The doctrine of comity arises from the nature of our federal system, the joinder of sovereign states into a single union. Mutual respect among sovereigns for the legislative, executive, or judicial acts of each other constitutes the heart of the doctrine. Considerations of finality, avoiding piecemeal litigation, and preventing disruption of custody also support comity." *McGee v. Estelle*, 722 F. 2d 1206, 1210 (5th Cir. 1984)(citations omitted). *McGee* further recognized that a federal court may either accept or reject a state's waiver of exhaustion or notice *sua sponte* the lack of exhaustion. *Id.* at 1214. Further, in *Thompson v. Wainwright*, 714 F. 2d 1495 (11th Cir. 1983) *cert. denied*, 466 U.S. 962 (1984), that Court, recognizing that interests of comity underlie the exhaustion doctrine and that a district court has discretion on whether to recognize a waiver finding "[c]omity is not a one way street...Strong federal interests may exist that, balanced against those of the state in the particular case, will permit the district court in its discretion to decline a waiver and require state exhaustion. An unconditional right of waiver would increase the burden on the federal system." *Id.* at 1509. ***But see*** newly enacted Antiterrorism and Effective Death Penalty Act of 1996, discussed *infra* at 30.

[16] Justice Blackmun, dissenting in *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) wrote that "[f]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power."

clearly was not "required" to *sua sponte* invoke procedural default as the petitioner suggests, such invocation in this case was clearly not an abuse of discretion. The situation herein implicated both the law of Louisiana and Mississippi, two distinct interests the Fifth Circuit had the authority to consider. At the time the District Attorney for the State of Louisiana replied that petitioner had exhausted his state court remedies regarding his claims in federal court, clearly the District Attorney was referring to the "Statement Of The Claims" listed as No. 1 through No. 9 of the federal habeas application that was identical to the "Statement Of The Claims" that was included in the previously rejected state application for post conviction relief. Compare J.A. at 9-10 to J.A. at 38-39. Notably, the District Atttorney briefed the claims as listed by petitioner as No. 1 through No. 9, and did not address any additional bases for relief that petitioner may have inserted in the encompassing memoranda of law. J.A. at 58-66.

Likewise the magistrate's Report And Recommendation again addressed only the claims listed by petitioner as No. 1 through No. 9. J.A. at 67-76. As far as either party to the Fifth Circuit litigation was concerned, the issue of a collateral attack on the Mississippi convictions, which, prior to petitioner's objections to the magistrate's report, had only been partially addressed in the petitioner's accompanying memoranda as the "7B claim", did not reach the forefront of any forum until the Fifth Circuit itself ordered that the *Custis* issue[17] be briefed. (J.A. at 9-10, 38-39, 86-87, R.M. at 202.)

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[17] *Custis, supra,* held that, unless a prior conviction had been obtained without benefit of counsel in violation of the Sixth Amendment, the due process clause is not offended by declining to allow constitutional

Heretofore, prior to the Fifth Circuit's decision, only the law of Louisiana had been at issue in any state or federal forum. Moreover, the *pro se* petitioner's attack on his Louisiana conviction based upon a collateral attack of his prior Mississippi convictions was not raised under *Boykin*[18] until he filed objections to the magistrate's report, and it was not until appellate review before the Fifth Circuit had the merits of the *Boykin* claim been briefed or orally argued by any party to the litigation. (R.M. at 225-245, 246-253.)[19]

The litigation in the instant case makes clear that the interests of two sovereign states, Louisiana and Mississippi, were implicated once the Fifth Circuit's *de*

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attacks on prior convictions at sentencing for purposes of repeat offender statutes. *See also* Smith, *More Than A Question Of Forum: The Use Of Unconstitutional Convictions To Enhance Sentences Following Custis v. United States*, 47 Stan. L.Rev. 1323, 1325, recognizing that the *Custis* holding "thus precludes most defendants facing an enhanced sentence under "Three Strikes And You're Out" statutes - or any other recidivist statute - from claiming at sentencing that their prior strikes are constitutionally infirm."

[18] In his memoranda in state and federal courts, Trest cites *Boykin* but not in relation to his Claim No. 7 that "[t]he evidence introduced by the State as to prior felony convictions was illegally entered into evidence." Trest cites *Boykin* for the proposition that his Mississippi guilty pleas were unconstitutionally infirm for the first time in his objections to the magistrate's report. Trest had previously cited *Boykin* for support of his fifth claim that "[t]he Trial Court failed to advise Petitioner of the right to 'remain silent' and not to incriminate himself as to prior felony convictions" in the context of his testifying at his trial in Louisiana. J.A. at 10, 13-17, 18-20, 39, 42-45, 47-48..

[19] Both briefs for the State and the petitioner focused on the *Boykin* claim raised for the first time in the petitioner's objections to the magistrate's report rather than the "7B claim" raised previously in the state and lower federal courts. The District Attorney never objected that the *Boykin* claim had not been fairly presented to the state or lower federal court.

novo review focused upon petitioner's collateral attack on his Mississippi guilty pleas. While the federal jurisprudence recognizes that some federal courts are not inclined to *sua sponte* invoke a procedural bar not heretofore announced by the respondent State, other federal courts recognize that there may be certain circumstances under which the *sua sponte* invocation is appropriate. The latter position is clearly consistent with this Honorable Court's holding in *Granberry*, *supra*.

Petitioner argues to this Court that because *Granberry* involved the doctrine of exhaustion and the protection of federal interests, it should not be controlling on the instant facts. *See Brief For Petitioner* at 18. However, the instant facts necessarily implicate the interest of two distinct and sovereign states, and therefore, considerations of comity arise.

In discussing the defenses of nonexhaustion and procedural default, the Tenth Circuit of the United States Court of Appeals in *Hardiman v. Reynolds*, 971 F. 2d 500, 503 n. 4 (10th Cir. 1992), relying on *Brown v. Fauver*, 819 F. 2d 395, 398 (3d Cir. 1987), stated, "[a]lthough we recognize important differences between these two defenses, the test elaborated in *Brown* [to justify *sua sponte* invocation of nonexhaustion defense] i.e., does the defense substantially implicate important values that transcend those of the parties – also applies to the state procedural bar defense. Moreover...the nonexhaustion defense, like the procedural default defense, involves considerations of comity." *Id.* This Honorable Court in *Wainwright v. Sykes,* 433 U.S. 72, 83 (1977), *overruling in part, Fay v. Noia*, 372 U.S. 391, 430 (1963), [the latter decision being subsequently abrogated by *Coleman v. Thompson,* 501 U.S. 722 (1991)] further recognized the considerations of judicial efficiency and the orderly

administration of criminal justice as supporting the procedural default doctrine.

The *Hardiman* Court added "[b]ecause these concerns substantially implicate important interests beyond those of the parties, it is not exclusively within the parties' control to decide whether such a defense should be raised or waived." *Id.* at 502. In *Smith v. Moffett*, 947 F. 2d 442, 445 (10th Cir. 1991), the Tenth Circuit held that "we have discretion to raise comity issues sua sponte." Federal appellate as well as district courts have the authority to raise a state procedural bar *sua sponte*. *See Manlove v. Tansy,* 981 F. 2d 473, 476 n. 4 (10th Cir. 1992).

When the Fifth Circuit requested that the parties address the *Custis* issue, it necessarily implicated a collateral constitutional attack on Mississippi convictions although Mississippi was not a party to the litigation. In *Presnell v. Kemp*, 835 F. 2d 1567, 1573-75 (11th Cir. 1988), *cert. denied,* 488 U.S. 1050 (1989), the 11th Circuit found that the type of state procedural rules that may foreclose habeas relief are those that require a criminal defendant to present his claims of error seasonably, so that, if meritorious, the error can be remedied efficiently and with minimal delay. These procedural rules, besides fostering finality of convictions, also deter "sandbagging," the withholding of claims in an effort to get more than "one bite of the apple." *See Wainwright v. Sykes*, 433 U.S. at 89-90.

The Fifth Circuit's jurisdiction involves the sovereign states of Louisiana, Texas and Mississippi. The doctrines of comity and federalism concern the relationship between the federal government and each independent and sovereign State. For petitioner to claim that the only interests at stake herein are those of the State

of Louisiana ignores the plain fact that the interests of the State of Mississippi are equally drawn into the fray. To find, as the petitioner suggests, that the State of Louisiana has waived procedural default flies in the face of Mississippi's interests when it is the State of Mississippi's laws that create the procedural bar upon which the Fifth Circuit relies. Even assuming *arguendo* that Louisiana has waived the defense of procedural default, the Fifth Circuit in its discretion may *sua sponte* invoke procedural default to protect the finality of the Mississippi convictions at issue herein. *Id.*

Granberry involved the defense of nonexhaustion of state remedies as opposed to the procedural default at issue in the present case. Trest's failure to exhaust his remedies in Mississippi are now moot in that the cause of action has prescribed, and he cannot now collaterally attack those convictions in Mississippi.[20] Put another way, because Trest's right to collaterally attack his Mississippi convictions has prescribed he has technically met the requirements of exhaustion. *See Gray v. Netherland*, __ U.S. __, 116 S.Ct. 2074, 2080 (1996), *citing Castille v. Peoples*, 489 U.S. 346, 351 (1989). However, for policy reasons enunciated in *Granberry*, the Fifth Circuit's *sua sponte* invocation of procedural default in this case and on the record as it appeared before that court was not an abuse of discretion.

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[20] Although the Fifth Circuit rests its holding on a procedural default in Mississippi, the State of Louisiana responds herein that given Trest's procedural history in Louisiana state courts, he would similarly be barred from seeking further relief regarding any newly claimed unconstitutionality of the Mississippi convictions. *See* La.C.Cr.P. art. 924 *et seq.*, App. C at 10a-19a. This procedural bar would clearly apply to the *Boykin* claim Trest raised for the first time in his objections to the magistrate's report.

In *Granberry* this Honorable Court recognized that federal courts have discretion to decide whether failure to exhaust state court remedies should be invoked despite the state's failure to raise that defense. This Court determined that federal appellate courts in such instances possess discretion to decide whether exhaustion is required or whether the interests of comity and federalism would be better served by addressing the claims on the merits. *Granberry*, 481 U.S. at 135. A federal court may overlook a prisoner's failure to exhaust his state court remedies, and if the habeas petition clearly demonstrates a lack of merit, "the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the State fails to raise the exhaustion defense, the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court." *Id.*, at 135. Clearly the principle behind *Granberry* is that a federal court must be allowed flexibility in handling habeas petitions. For these reasons, the Fifth Circuit's *sua sponte* invocation of procedural default should be allowed.

Further, Louisiana has relied upon the presumed validity of the Mississippi convictions.[21] Petitioner admits

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[21] *Amicus curiae* brief filed in this matter by the National Association Of Criminal Defense Lawyers in support of petitioner's position argued that petitioner had not committed procedural default because he had presented his claims regarding the constitutionality of his Mississippi convictions to Louisiana courts. *See Brief For The National Association Of Criminal Defense Lawyers As Amicus Curiae In Support Of Petitioner* at 3-8. This argument has no merit in light of the record as it now appears before this Honorable Court. While it is true that petitioner's "7B claim" was mentioned in supporting memoranda in state and federal district court, the *Boykin* claim did not surface until late in the federal litigation as objections to the magistrate's report. Therefore, no court prior to the Fifth Circuit had entertained the *Boykin* claim.

and the record demonstrates that at the time of his habitual offender proceeding in June 1979 that his counsel did not lodge a contemporaneous objection under La. C.Cr. P. art. 841. *See App.* C at 8a. Further, Trest could have, but opted not to, attack the constitutional validity of his Mississippi pleas under *Boykin* as late as his first *pro se* application for state post conviction relief in February 1981. (R.M. at 0-13, 94-97). At the time, Louisiana law provided that once the State had proven the existence of prior felony convictions beyond a reasonable doubt, including a showing that the defendant was represented by counsel, Trest had the ultimate burden of proving affirmative evidence that a federal or out-of-state conviction used to enhance a Louisiana sentence was unconstitutional. At that point, the burden shifted back to the State to affirmatively prove the plea's constitutionality for use as an enhancement. *See State v. Shelton*, 621 So. 2d 769, 771 (La. 1993), by which limited the holding of *State ex rel. Jackson v. Henderson*, 255 So. 2d 85 (La.1971) to convictions entered after December 8, 1971. *See also State ex rel. LeBlanc v. Henderson*, 259 So. 2d 557 (La. 1972). The Louisiana Supreme Court has held that a guilty plea will be considered knowingly and voluntarily made as required by *Boykin* only if accused made an articulated waiver of the three essential rights - right to a jury trial, right to confront witnesses, and right against self-incrimination as determined by the entire record.[22] The essence of the petitioner's *Boykin* claim

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[22] In petitioning this Honorable Court for a writ of certiorari, Ms. Hudsmith cited an excerpt from the Mississippi plea colloquy showing an obvious typographical error. *See Petition For A Writ Of Certiorari* at 8. While the entire transcript was admitted into the Fifth Circuit record at the time petitioner objected to the magistrate's report, it had never been presented to a Louisiana court. *LeBlanc* recognized that Louisiana courts should make a determination of a valid *Boykin* waiver

herein that was not raised until objections were filed to the magistrate's report belatedly attacks the Mississippi convictions on this basis.

To reach the merits of his claims, petitioner argues that procedural default is an affirmative defense which the State of Louisiana waived by not expressly invoking it, and therefore, the Fifth Circuit should have addressed Trest's claims concerning his prior Mississippi convictions used to enhance his Louisiana sentence. *Brief For Petitioner* at 18-19. The State of Louisiana clearly informed the federal district court that exhaustion of state court remedies was not at issue, given, at the time of the response, the identical *pro se* petition for federal relief had been previously filed *pro se* in state court, and that the state district court had addressed the merits of the "Statement Of The Claims" No. 1 through No. 9, in which relief was summarily denied by the Louisiana Supreme Court. It is equally clear that at no time did the State of Louisiana object on the basis of procedural default by invoking the law of Mississippi pursuant to 28 U.S.C. § 2254 (b).[23]

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on the entire record "because the requirement of a simultaneous verbatim entry of the colloquy would allow 'the unfortunate lapse of a court report [to defeat] the conviction, irrespective of how well the judge handles the guilty plea." *Shelton*, 621 So. 2d at 772, *citing LeBlanc*, 259 So. 2d at 560. A Louisiana court obviously reviewing this matter in the first instance would only determine the validity of an out-of-state plea limited to its use for enhancement purposes only.

[23] The State of Louisiana fails to understand petitioner's assumption that the State of Louisiana was required by 28 U.S.C. § 2254 (b)(prior to the recent amendment) to inform the federal district court that petitioner had not exhausted his Mississippi court remedies, which requires that a state prisoner in custody pursuant to a state judgment shall not be entitled to federal habeas relief unless he "has exhausted the remedies available in the courts of the State..." *See United States ex rel. Avila v. Ahitow*, 791 F. Supp. 197, 199 (N.D. Ill. 1992), *citing*

B. *Sua sponte* invocation of procedural bars is best decided on a case-by-case basis.

Assuming *arguendo*, that the State of Louisiana implicitly waived any and all procedural bars, *Granberry, supra*, as well as other lower federal decisions clearly support allowing such *sua sponte* invocation based upon a case-by-case basis. *See Davis v. Campbell*, 608 F. 2d 317, 320 (8th Cir. 1979)(even though state by error did not argue nonexhaustion, federal court of appeals could *sua sponte* invoke doctrine out of state-federal comity interests); *U.S. ex rel. Isaac v. Franzen*, 531 F. Supp.

Smith v. Digmon, 434 U.S. 332 (1978), for the proposition that proper exhaustion requires that the prisoner "'fairly present' the issue to the highest court of the state that possesses the power to review the question. The State of Louisiana has no authority to invalidate a Mississippi conviction in the first instance. At the time of Trest's habitual offender hearing under La. R.S. 15:529.1 (West 1979), the State was required to prove beyond a reasonable doubt that a valid out-of-state felony conviction existed, to which a presumption of regularity and validity attached. The burden then shifted to Trest to rebut that presumption by proving its invalidity by a preponderance of the evidence. In this case, Trest's counsel did not lodge a contemporaneous objection at the time of the habitual offender proceeding, and the issue was not raised in state post conviction relief until Trest filed his third such application on January 17, 1990. Meanwhile, Trest's cause of action to attack his prior Mississippi convictions in Mississippi prescribed in 1987. *See also Neyland v. Blackburn*, 785 F. 2d 1283, 1293 (5th Cir. 1986), *cert. denied*, 479 U.S. 930 (1986), *citing State of Louisiana v. Bernard*, 366 So. 2d 1294, 1299 (La. 1978)(recognizing that state prisoner's federal habeas claim that his prior Texas guilty plea was unconstitutionally infirm for enhancement purposes is rejected where Louisiana demonstrates evidence to support a finding that out-of-state guilty plea was made with benefit of counsel, was voluntary and prisoner was aware of the consequences of the plea).

1086, 1089 (N.D. Ill. 1982)(federal court had independent duty to ensure compliance with exhaustion requirement); and *Smith v. Horn*, __ F. 3d.___(3d Cir. 1997), 1997 WL 412087 at 6 (recognizing federal court of appeal may *sua sponte* raise procedural default). *See also Ortiz v. Dubois*, 19 F. 3d 708, 714 (1 Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995); *Brewer v. Marshall*, 119 F. 3d 993 (1 Cir. 1997)(recognizing district court in federal habeas proceeding may consider procedural default *sua sponte*); *Washington v. James*, 996 F. 2d 1442 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Hull v. Freeman*, 932 F. 2d 159, 164 n. 4 (3d Cir. 1991), *overruled on other grounds*, *Caswell v. Ryan*, 953 F. 2d 853 (3d Cir. 1992), *cert. denied*, 504 U.S. 944 (1992); *Odom v. Boone*, 62 F. 3d 327, 332 (10th Cir. 1995)(failure of respondents in habeas corpus to raise procedural bar did not preclude court of appeals from raising it *sua sponte*); and *Hardiman, supra*, 971 F. 2d at 502-04 and n. 4.

While admittedly the Fifth Circuit's opinion is silent as to the *Granberry* analysis, its holdling clearly rests on giving respect to Mississippi law. Moreover, *Granberry* makes clears that the Fifth Circuit obviously *was not required* to invoke the bar on its own motion; however, because the Court chose to do so does not mean that on these facts, the Court's *sua sponte* invocation was improper.

Petitioner's argument to this Court for a constitutionally required "waive it or lose it" approach implies that only the State of Louisiana's interests are at stake. As argued *supra* a federal court is required to protect the interests of all States, not just one in particular. Louisiana may arguably have no interest in protecting the procedural rules of the State of Mississippi, but a federal court should and does have such an interest. *Brief For Petitioner* at 20. *See also Bannister v. Delo*, 100 F. 3d 610, 622 (8th Cir. 1996), *cert. denied*, __ U.S.__, 117 S.Ct. 2526 (1997), wherein the Eighth Circuit *sua sponte* invoked the nonretroactivity issue under *Teague v. Lane*, 489 U.S. 288 (1989) even though the State did not raise it. The Eighth Circuit further recognized a need not to accept the state's waiver of exhaustion in certain circumstances. *See Victor v. Hopkins*, 90 F. 3d 276, 278 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1091 (1997) and *Duvall v. Purkett*, 15 F. 3d 745, 747 n. 4 (8th Cir. 1994), *cert. denied*, 512 U.S. 1241 (1994)("[t]he purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas corpus, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to a federal court").

Citing *Gray v. Netherland*, __ U.S. __, 116 S.Ct. 2074 (1996), *Jenkins v. Anderson*, 447 U.S. 231 (1980), *Engle v. Isaac*, 456 U.S. 107 (1982) and *Estelle v. Smith*, 451 U.S. 454 (1981), petitioner argues that the Fifth Circuit's *sua sponte* invocation of procedural default and refusal to address the merits despite the State of Louisiana's express waiver "...is contrary to the opinions of this Court and the circuit courts characterizing procedural default as an affirmative defense that is waived by the State's failure to assert it." *Brief For Petitioner* at 13, 20.

However, the fact that no state court in Louisiana ever expressly ruled upon the merits of Trest's collateral attacks on his Mississippi convictions under *Boykin* is clearly discernible from the record. Contrary to the petitioner's argument, this Honorable Court's decision in *Granberry*, which was subsequent to all the above-cited cases except *Gray v. Netherland, supra*, allowed the State

to belatedly raise the issue of procedural default for the first time on appeal. The petitioner at no time articulates how the Fifth Circuit's action is fundamentally unfair by the *sua sponte* invocation of procedural default. To read this Court's prior decisions to constitutionally prohibit the *sua sponte* invocation of procedural default under any and all circumstances would result in an inflexibility that the *Granberry* Court itself rejected.

In *Picard v. Connor*, 404 U.S. 270 (1971), upon which the *Gray* Court relied, this Court considered whether a claim not properly presented to the state or federal courts could entitle a federal habeas petitioner to relief. This Court required that "the substance of the federal habeas corpus claim must first be presented to the state courts..." *Gray*, __ U.S. __, 116 S.Ct. at 2081, citing *Picard*, 404 U.S. at 278. The *Picard* Court further recognized that "...we cannot fault that [state] court for failing also to consider *sua sponte* whether the indictment procedure" violated federal equal protection principles. *Id.* at 277.

Clearly the *Boykin* claim regarding Trest's collateral attack on his Mississippi conviction was not addressed by any court prior to the Fifth Circuit. This Honorable Court should recognize that at no time could the State of Louisiana have raised a procedural bar on this issue until late in the litigation following petitioner's filing of his objections to the magistrate's report in that the State was not put on notice as to the existence of such a claim until that time. The *Gray* Court itself recognized that a claim heretofore not presented to any state or federal court would be barred from consideration on federal habeas review. "If the claim was not raised or addressed in federal proceedings below, our usual practice would be to decline to review it." *Gray*, __ U.S. ___, 116 S.Ct. at

2082, citing *Yee v. Escondido*, 503 U.S. 519 (1992). In fact, this Court in *Gray* remanded the case back to the Court of Appeals "to determine whether petitioner in fact raised what's in his brief on the merits to this Court he asserts has been his 'fundamental complaint throughout this litigation." *Id.*, 116 S.Ct. at 2082-2083.

The instant record supports a finding that the only merits addressed by any court - state or federal - were the substance of the claims petitioner listed in the "Statement Of The Claims" No. 1 through No. 9. Regardless of what possible fault might lie with the State of Louisiana for not sifting through every word in petitioner's memorandum of law filed with the federal court, the simple fact remains that no court expressly ruled upon the merits even as to his "7B claim" regarding a perceived constitutional invalidity of the Mississippi guilty pleas used to enhance his Louisiana sentence, and that the petitioner at no time objected until he filed his objections to the magistrate's report. Admittedly, the District Attorney could have responded to petitioner's objections to the magistrate's report, but did not do so. Likewise, the district court could have addressed petitioner's objections, but again, did not do so. Does that mean that the Fifth Circuit was constitutionally foreclosed from addressing procedural default *sua sponte*? The rationale of this Court's decision in *Granberry* indicates that the answer is clearly no.

Petitioner herein is asking this Honorable Court to hold that should a state fail to invoke, either explicitly or implicitly, a state procedural bar, and thereby, irrevocably waive this defense, then the federal court must always address the merits of petitioner's claim, regardless of whether an independent and adequate state ground exists that would have barred such review. Petitioner's contention is simply incorrect in light of the *Granberry*

approach. In *Granberry* this Court rejected the hard and fast rule which the petitioner contends is constitutionally required. The *Granberry* Court, relying on *Strickland v. Washington*, 466 U.S. 668, 684 (1984), reasoned that a court may choose to ignore a state's waiver and dismiss the petition for nonexhaustion or procedural default, but there is no *per se* rule. Rather, district courts are "to exercise discretion in each case" and "determine whether the interests of comity and federalism will be better served by addressing the merits or dismissing the petition." *Id.* at 131. The facts of the instant case provide a good example as to how unworkable the absolute bar to *sua sponte* invocation of procedural default would be.

The Fifth Circuit was equally aware that even though the State of Louisiana appeared as the party respondent, comity and federalism issues were implicated given that Trest had not afforded the State of Mississippi, in the first instance, the opportunity to rule upon alleged constitutional infirmities of Mississippi convictions. The exhaustion requirement of 28 U.S.C. § 2254 clearly involves considerations of whether a petitioner has exhausted his claims for relief under the laws of the custodial state. To say that § 2254 plainly puts Louisiana on notice that it needed to be concerned with the exhaustion of laws of another non-custodial state, such as Mississippi, is clearly a far stretch. Nonetheless, the given scenario is exactly why this Honorable Court should not handcuff the federal courts by invoking a constitutional bar to the *sua sponte* invocation of procedural default. Cf. *Lindh v. Murphy*, __ U.S. ___ 117 S.Ct. 2059 (1997)(holding that the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 (Pub.L. 104-132, 110 Stat. 1214 (April 24, 1996) applies only prospectively to federal habeas proceedings; new law

requires that state waivers of exhaustion requirements must be express.) *Compare* App. F at 27a-28a.

Based upon the foregoing authority, petitioner's contention that the Fifth Circuit could not *sua sponte* invoke procedural default is not consistent with prior binding precedent of this Honorable Court, and should be flatly and wholeheartedly rejected.

C. Other federal courts of appeals have allowed for the *sua sponte* invocation of procedural default.

As noted above, the Fifth Circuit's authority to *sua sponte* invoke procedural default has been recognized by other federal circuits as well. In *Esslinger v. Davis*, 44 F. 3d 1515 (11th Cir. 1995), the 11th Circuit for the U.S. Court of Appeals rejected the *sua sponte* invocation of procedural default, but only because the Court found an abuse of discretion based upon the misapplication of Alabama law. The Court wrote: "What federal interest would be served upholding a district court's misapplication of a state procedural bar to deny habeas relief? We can think of none." *Id.*, 44 F. 3d at 1526. At no time has the petitioner alleged to this Honorable Court that the Fifth Circuit incorrectly applied Mississippi law.[24] *But see Henderson v. Thieret*, 859 F. 2d 492, 493 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989)(noting that the district court may raise procedural default *sua sponte* but not where state has implicitly indicated a desire to waive that defense.)

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[24] The *amicus curiae* brief filed by the State of Mississippi in this matter points out that the Fifth Circuit correctly applied Mississippi law.

Moreover, the *Esslinger* Court as well did not *per se* ban its lower federal courts from *sua sponte* invoking a procedural bar where a state has expressly waived the default. Rather, the Court recognized that "the district court may invoke the bar [of failure to exhaust] sua sponte where, notwithstanding the state's waiver, requiring the petitioner to return to state court to exhaust his claims serves an important federal interest. Another potential bar is the petitioner's failure to comply with a state procedural rule -- for example, a rule that specifies the time during a criminal prosecution, *or collateral proceeding attacking a conviction,* that a claim of error must be raised." *Id.*, 44 F. 3d at 1524 (Footnotes omitted, emphasis added).

Clearly the factual situation presented to the *Esslinger* Court is not similar to the factual situation of the instant case as the petitioner suggests. *See Brief For Petitioner* at 11. In citing *Granberry* at 134-35, the *Esslinger* Court recognized that despite a state's waiver, both comity and federalism may support a federal court's requiring complete exhaustion of state court remedies. Likewise, just as exhaustion recognizes a state's interest in resolving constitutional issues in the first instance, the doctrine of procedural default protects the state's interest in protecting convictions from untimely constitutional challenges.

Petitioner maintains that the Fifth Circuit's conclusion that it was foreclosed from the merits is equivalent to the conclusion that the Fifth Circuit believed it was required to *sua sponte* invoke procedural default. From reading the *Trest* opinion, one concludes that the Fifth Circuit's *sua sponte* invocation of procedural default is obviously based upon that federal court's recognition of the interest of the State of Mississippi in barring untimely collateral attacks on its own final criminal judgments.

Once the Fifth Circuit, in its discretion, undertook the recognition of Mississippi's interests and the procedural bar created by that State's independent and adequate procedural rule, the Court concluded that "...because the potential remedies in Mississippi courts for the constitutional defects..." as alleged by Trest "...were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these claims." *Id.*, 94 F. 3d at __, J.A. at 94-95.

II. The federal court of appeals properly decided it was foreclosed from reaching the merits of petitioner's habeas petition based upon a state procedural rule arising under Mississippi law.

A. The Fifth Circuit's foreclosure is consistent with the procedural default doctrine.

Once the procedural bar was raised *sua sponte,* the Fifth Circuit then recognized this Honorable Court's pronouncement in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) that the petitioner must establish "...*cause for the default and actual prejudice* as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in *a fundamental miscarriage of justice*." (Emphasis added.) *Trest*, 94 F. 3d at 1009 (J.A. at 95). *See also Wainwright*, 433 U.S. at 83, 88-89 also recognizing state procedural bar rule is a matter of comity and "serves the interest of finality and forces the issues to be considered when they are freshest and when the state's resources have been marshalled to address them." *See also Hardiman, supra,* at 503. Further, where no remedy exists due to failure to exhaust,

the problem becomes a determination that "cause and prejudice exists to excuse" the default. *Rust v. Zent*, 17 F. 3d 155, 160 (6th Cir. 1994). [By analogy, the *Teague* doctrine as well bars habeas relief. *See Caspari v. Bohlen*, 501 U.S. 383, 389 (1994)(nonretroactivity principle of *Teague* generally precludes habeas relief to state prisoner based upon the announcement of a new constitutional rule after prisoner's conviction and sentence have become final.)]

Based upon Trest's concession that he neither appealed the Mississippi convictions nor challenged them collaterally in Mississippi, the Fifth Circuit found that "[i]n the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest had not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional." *Id.*, J.A. at 95. *See Wainwright v. Sykes*, 433 U.S. 72 (1977)(establishing "cause and prejudice" standard for procedural default). The Fifth Circuit was clearly protecting Mississippi's interests in the finality of its judgments pursuant to considerations of comity and federalism.[25]

Certainly under *Coleman supra,* the Fifth Circuit, as its opinion in *Trest* suggests, had the authority to find

[25] By attaching the plea colloquy, Trest injected new evidence into the proceedings. As *Burgin v. Broglin*, 900 F. 2d 990, 998 (7th Cir. 1990), *citing Williams v. Duckworth*, 724 F. 2d 1439, 1442 (7th Cir. 1983), *cert. denied*, 469 U.S. 841 (1984), noted, "Perhaps this [failure to present evidence to supreme court] was a 'deliberate bypass' of the state court in the hopes that the federal forum might be more hospitable to his claim; perhaps petitioner was not seriously troubled by his counsel's performance and was merely casting about an additional issue when he drafted his habeas petition. In either case, it would be inappropriate for a federal court to become involved."

that an adequate state ground existed in Mississippi that could bar federal habeas relief. It is equally clear that the state courts of Mississippi had never been asked firsthand by Trest to review the constitutionality of the Mississippi guilty pleas, and that such relief to Trest was now barred as a matter of Mississippi law. *Coleman* recognizes that a federal habeas review of a constitutional claim is barred if there exists an independent and adequate state procedural rule justifying such a denial absent a showing of cause and actual prejudice or a demonstration of a fundamental miscarriage of justice. *Id.* at 750. While *Coleman* does not address the issue of *sua sponte* invocation of procedural default where a state court has not acted, once the default is raised, the *Coleman* Court recognized that a federal court is foreclosed from reviewing a constitutional claim that is clearly barred under state law.[26]

While the state prisoner in *Coleman* was found to have procedurally defaulted his claim by failing to timely appeal his federal claims in state court, and the Commonwealth had objected on the basis of procedural default, the fact that a federal court *sua sponte* invokes the adequate and independent state law doctrine should not change the result. In this case, admittedly no Louisiana court had addressed the merits of petitioner's claim that his Mississippi pleas were constitutionally infirm under *Boykin*, either on state procedural grounds or federal grounds. Furthermore, the proper forum for addressing

[26] In *Ford v. Georgia*, 498 U.S. 411 (1991), this Honorable Court reversed a decision by the Georgia Supreme Court that had held that a defendant's equal protection claim was procedurally barred. The Court found that the state bar at issue was not "affirmatively established and regularly followed" as required for a state procedural requirement to bar consideration of a federal claim. *Id.*, 498 U.S. at 422-424. Trest does not maintain that Mississippi's procedural bar is not firmly established and regularly followed.

the validity of the Mississippi convictions in the first instance would clearly have been the State of Mississippi and not the State of Louisiana. *See e.g.* Smith, *supra,* note 18 at 1335, *citing United States v. Custis*, 988 F. 2d 1355, 1361 (4th Cir. 1993), *aff'd*, *Custis v. United States*, 511 U.S. 485 (1994)(lower federal court recognizes "burden on prosecutors and courts, as well as problems of comity and federalism, that would arise from allowing fact-intensive hearing concerning prior convictions in other jurisdictions.") Petitioner's own inaction triggered an independent and adequate state procedural bar by which his claims were forfeited. For these reasons, the Fifth Circuit correctly concluded that it was foreclosed from reaching the merits based upon petitioner's default in Mississippi.

The Fifth Circuit could have reached the same result under Louisiana law. Certainly the newly raised *Boykin* claim is now procedurally barred in Louisiana given petitioner's repetitive filings. Therefore, for purposes of Louisiana law, Trest would as well be procedurally barred, and Louisiana's law would become an adequate and independent state procedural bar by which the Fifth Circuit could deny habeas relief. *See* La.C.Cr.P. art. 924 *et seq*. *See* App. C at 10a-19a. The question then becomes, did the Fifth Circuit constitutionally err by *sua sponte* relying upon a state procedural bar of a non-custodial state, i.e. Mississippi? This Court's policy reasons underlying *Coleman* should apply with equal force, regardless of which state's procedural laws formed the basis for the bar.

Furthermore, petitioner's position before this Honorable Court is directly contrary to this Court's policy announced in *Coleman* that once a federal court establishes that petitioner has defaulted his federal claims

in state court pursuant to an independent and adequate state procedural rule, federal review is barred unless the petitioner establishes cause and actual prejudice, as discussed, *infra*, or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. This Court recognizes that the cause and actual prejudice standard was selected in order to afford deference by the federal courts to the respective States that state procedural rules or decisions resting squarely upon state law will be respected in the interests of comity and finality of the States' criminal prosecutions. In barring a federal habeas petition on the procedural default of failure to appeal, this Court stated in *Coleman*:

> We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them...All of the State's interests – in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors -- are implicated whether a prisoner defaults one claim or all of them. A federal court generally should not interfere in either case.
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> *Id.*, 501 U.S. at 750.

This Honorable Court also recognized in *Coleman* that similar to state procedural rules, federal procedural rules are likely to bar consideration of federal claims on the basis that a claim has prescribed or is otherwise untimely even though the invocation of a particular federal procedural rule may bar consideration of a federal constitutional claim. *Id.*, 501 U.S. at 751. As this Court instructed, "No less respect should be given to state rules of procedure." *Id.*

Further, the Fifth Circuit's decision that it was foreclosed from addressing the merits once the procedural bar was invoked is correct. This decision is justified by the recognition of Mississippi's interest in preserving the finality of its convictions upon which no timely constitutional challenge has been made in its state courts in the first instance.

B. Petitioner is not "actually innocent" and the record does not support a finding of actual prejudice.

Moreover, the preclusion of federal habeas relief in this case does not offend the ends of justice or result in a fundamental miscarriage of justice a state prisoner may avoid the cause and prejudice hurdle by a showing of actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The fundamental miscarriage of justice exception is available "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). In general, while the "miscarriage of justice" exception to procedural default is more loosely applied for purposes of procedural default than for purposes of failure to exhaust (wherein the petitioner may return to state court), the Second Circuit in *Washington, supra* at 1449-50, relying on *Granberry*, recognized this Honorable Court has narrowly limited the exception of fundamental miscarriage of justice to cases where petitioner "challenges the validity of trial itself" or where "federal violations were motivated by malice and not caused by mere inadvertence or poor judgment." Petitioner at no time has maintained actual innocence, either as it pertains

to his convictions in Louisiana or Mississippi. Nor could he.[27]

With such narrow exceptions, legitimate grounds of efficiency and finality would otherwise be ignored.

As a result, the Fifth Circuit correctly decided that it was foreclosed from reviewing the merits of petitioner's federal habeas petition.

III. Petitioner's habeas claims were not properly presented or properly raised.

As discussed above, the State of Louisiana further argues that the petitioner did not articulate a claim under *Boykin v. Alabama,* 395 U.S. 238 (1969) that his Mississippi guilty pleas were not intelligently and voluntarily made[28] until he incorporated this *Boykin* issue

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[27] As noted previously, petitioner, testifying at his armed robbery trial, admitted he robbed the victim, albeit, alleging he was unarmed, and that he been convicted of five burglaries in Mississippi, wherein the plea colloquy demonstrates that he admitted to those previous crimes as well. R. at 81, 120-130.

[28] The State of Louisiana argues herein the despite the District Attorney's failure to object before the Fifth Circuit regarding the newly raised *Boykin* claim that this Honorable Court should recognize that the petitioner's failure to raise the claim is now precluded from presenting the claim through his "inexcusable procedural default" as recognized in *Wainwright v. Sykes*, 433 U.S. 72 (1977). As the Western District of Louisiana noted in *United States v. Sincox*, 430 F.Supp. 1151, 1153 (W.D.La. 1977), *rev'd on other grounds*, 571 F. 2d 876 (5th Cir. 1978), relying on Justice Powell's concurrence in *Estelle v. Williams*, 425 U.S. 501, 507 (1976), "[b]lind and strict enforcement of constitutional rights is not necessarily required in order to insure the fundamental fairness of a trial. Due process is violated only when a defendant is forced to suffer deprivation of his rights, despite his objections to the proceedings to which he is subjected. Recent jurisprudence teaches that a conviction should be left standing despite a claimed infringement of a constitutional right when the

into his newly expanded "7B claim" in his objections to the federal magistrate's Report And Recommendation. Petitioner also attached for the first time the plea colloquy from Mississippi state court. J.A. at 77-83, R. at 206-222. Prior to that time, petitioner had not assigned as error the alleged invalidity of the Mississippi convictions in his "Statement Of The Claims" Nos. 1 through 9 in either his state post conviction relief application or his federal habeas application, which was based upon the identical nine grounds for relief. The only mention of the perceived invalidity of the Mississippi convictions is found in the petitioner's memoranda filed in both state, federal district court and the Fifth Circuit, in which petitioner complains in subpart 7 (B) (i.e. his "7B claim') that the Mississippi court record did not reflect that petitioner was advised "of his right to appeal his guilty plea..." and the Mississippi trial judge did not "inform Petitioner of his right to appeal or as to his right to counsel for said appeal...." J.A. at 3-23, 28-51, 19, 48; R.M. at 219.

The record before this Honorable Court[29] clearly demonstrates that, quite remarkably, even after filing the objections, his appellate brief to the Fifth Circuit drops the newly raised *Boykin* claim and does not address his other complaint voiced for the first time in his objections that the lower state and federal courts had also failed to

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defendant has made an 'inexcusable procedural default' in failing to object at a time when the substantive right could have been protected."

[29] Both the State of Louisiana and the petitioner have consented to enlarging the record for purposes of this Honorable Court's review and have likewise petitioned this Court to do so. *See Petitioner's Motion To Enlarge The Record* with attachments, *Respondent's Motion To Enlarge The Record* with attachments and *Respondent's Supplemental To Enlarge The Record* with attachments. At the time of this printing, the motions were pending before the Court.

address the merits of the "7B claim". R.M. at 205-222. In fact, his Fifth Circuit brief is almost identical to those he filed in the state court and federal district court. *Compare* R.M. at 205-22 with J.A. at 3-23 and J.A. at 28-36. The claims surrounding a constitutional challenge on the Mississippi convictions do not resurface again until the Fifth Circuit itself appoints Trest a lawyer and requests briefs on the *Custis* issue. J.A. at 86-87, R.M. at 202. *See Castille v. Peoples*, 489 U.S. 346, 349-351 (1989)(recognizing that habeas prisoner's raising issue for first time in state supreme court not "fair presentation" of claim for purposes of exhaustion.) *See also Washington v. Lane*, 840 F. 2d 443, 445 (7th Cir. 1988), *cert. denied*, 488 U.S. 861 (1988)(recognizing that if a petitioner fails to raise an issue in the state court proceedings, he cannot raise it for the first time in a federal habeas petition) and *Burgin*, *supra* at 994 (habeas prisoner who failed to bring relevant evidence to attention of state court during direct appeal waived right to habeas relief because evidence was not newly discovered; claim was procedurally defaulted despite state's failure to raise defense, court of appeals was not precluded from deciding that petitioner had committed procedural default.)

In his objections to the magistrate's report, petitioner for the first time questions the validity of his Mississippi convictions under *Boykin* on the grounds that he pleas were not intelligently and voluntarily made. While admittedly acting *pro se*, Trest's objections clearly indicated that he knew he could not add a new ground for relief when he wrote "[t]he issues presented herein are not new, the claim was properly raised and preserved through the course of the post-conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obsured, [sic] but nevertheless raised and preserved."

J.A. at 77-83. While the State recognizes that allegations of a *pro se* prisoner are held to a less stringent standard for articulating his grievances than formal pleadings filed by lawyers, and that, such *pro se* pleadings are liberally construed, on the other hand, a *pro se* litigant is not permitted to disregard the substantive and procedural rules. *See Haines v. Kerner*, 404 U.S. 519 (1972), *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975), and *Guidroz v. Lynaugh*, 852 F. 2d 832, 834 (5th Cir. 1988). See also *United States v. Pinkey*, 548 F. 2d 305, 311 (10th Cir. 1977)(recognizing that a *pro se* litigant acquires no greater rights than a litigant represented by a lawyer).

The Fifth Circuit, in deciding petitioner's appeal from district court, expressly stated that it would review the district court's factual findings for clear error but review all legal issues *de novo*. *Trest v. Whitley*, 94 F. 3d at 1007, J.A. at 90. Following precedent, the Fifth Circuit cited *Lott v. Hargett*, 80 F. 3d 161, 163 (5th Cir. 1996), wherein the Court declined to review an inmate's federal habeas petition under *Boykin* finding that the trial court's invocation of Mississippi's statutory time limit was an independent and adequate state ground which barred federal review. *Id.*, 94 F. 3d at 1009, J.A. at 92-93.

Clearly, petitioner, no matter how unskilled, realized the *Boykin* claim was newly raised in his objections; otherwise, why did he attach the plea colloquy for the first time to support his claim? These actions show an awareness that Trest was raising a new claim for relief, which he knew was not permissible at that stage of the litigation. In addition, he knew and has conceded that he did not challenge his Mississippi convictions, either on direct or collateral review in Mississippi. Therefore,

Trest could have provided reasons for this procedural default at this point. This he failed to do.

In addition to the newly raised *Boykin* claim, petitioner's objections addressed his "7B claim" that was mentioned in memoranda to the state and lower federal court although not included in the list of nine claims in the application. However, the question arises as to whether the "7B claim" could be said to have been "fairly presented" in that the state trial court and the lower federal court appear to address only the merits of petitioner's Claim No. 7 that the evidence used against him at the state habitual offender hearing was illegal. The record herein supports a finding that the substance of the "7B claim" was neither fairly presented nor considered by the state or lower federal court. *See Anderson v. Harless*, 459 U.S. 4 (1982). Further, Trest's pro se last brief to the Fifth Circuit itself disregarded his previous grievance raised in the objections to the magistrate's report that the lower courts had ignored his "7B claim." Accordingly, the record before this Honorable Court does not support a conclusion that Trest had adequately raised and/or presented his constitutional challenges to the Mississippi convictions in the state or lower federal courts. *See Burgin, supra,* at 996, *citing Sotelo v. Indiana State Prison*, 850 F. 2d 1244, 1252 (7th Cir. 1988) (where inmate made Sixth Amendment claim on a different basis in state court than he did in federal district court, petitioner waives claim in federal court without a showing of cause and prejudice.)

IV. The federal court of appeals properly decided that a *pro se* petitioner had procedurally defaulted his constitutional claims by not pursuing those claims in

the State of Mississippi without first allowing the petitioner notice and an opportunity to be heard.[30]

In brief to this Honorable Court, petitioner argues that the *sua sponte* invocation of procedural default without first allowing him notice and an opportunity to be heard requires that the Fifth Circuit's decision in *Trest v. Whitley, supra* be reversed. [31] Petitioner relies upon the *Trest* dissent to support his position that the majority in *Trest* erred by not allowing the petitioner the opportunity

[30] The State of Louisiana, as respondent herein, directs this Honorable Court's attention to Rules of the Supreme Court of the United States, Rule 24 (1)(a) requiring the question presented for review, which provides, in pertinent part, that "...the brief may not raise additional questions or change the substance of the questions already presented in those documents." The State responds that petitioner's arguments on the issue of notice and opportunity to be heard under subheading I of petitioner's brief at iii are not fairly encompassed within the question in which this Honorable Court granted the petition for certiorari. *See* note 2, *supra*, and App. A at 5a-6a. However, as a precautionary mention, the State of Louisiana will argue this issue while retaining its original position at oral argument that the issue of notice and opportunity to be heard are not fairly encompassed within the question presented.

[31] The Fifth Circuit ruled that "[b]ecause his petition raises forfeited clams that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED." *Trest* at 1006, J.A. 88. The Fifth Circuit relied upon *Sones v. Hargett*, 61 F. 3d 410 (5th Cir. 1995), Miss. Code Ann. § 99-39-5 (2), *Odom v. State*, 483 So. 2d 343 (Miss. 1986), and *Phillips v. State*, 421 So. 2d 476 (Miss. 1982), and *Culberson v. State*, 612 So. 2d 342 (Miss. 1992) for the position that Mississippi law bars consideration of any constitutional challenge against predicate convictions used to trigger a habitual offender enhancement of a subsequent conviction. *Id.*, J.A. 90-93. The Fifth Circuit further relied on its prior opinion in *Sones, supra*, for the position that a claim under *Boykin* involves both factual and legal issues which that Court would not address for the first time on appeal.

to respond to the procedural default issue once the Court raised it on its own motion. *See Trest*, 94 F. 3d at 1005, J.A. at 97, and *Brief For Petitioner* at 10. The dissent's reasoning presupposes that the State of Louisiana had to pose a procedural bar of another state based upon a belatedly considered collateral attack of a prior conviction involving that other state. Even though the Fifth Circuit certainly may have allowed Trest an opportunity to respond to the *sua sponte* invocation of the Mississippi procedural bar, the fact that the Court ruled summarily does not *ipso facto* mean that the Fifth Circuit abused its discretion.

In *Femia v. United States*, 47 F. 3d 519 (2d Cir. 1995), the Second Circuit for the United States Court of Appeals held that, under certain limited circumstances, a federal district court could *sua sponte* dismiss a habeas corpus petition without prior notice to the petitioner of the same. In *Femia*, the petitioner had filed a successive federal habeas petition. The *Femia* Court held that the district court was not required to give notice to the petitioner that it intended to dismiss based upon the abuse of writ doctrine when the ground for the dismissal was the lack of actual prejudice.

To overcome a state procedural bar to federal habeas relief, Trest would have to establish either cause and actual prejudice or a fundamental miscarriage of justice. The record before the Fifth Circuit indicated that petitioner was, in fact, represented by counsel at the time his Mississippi pleas were entered.[32] *See also Luna v. Black*, 772 F. 2d 448, 450-451 (8th Cir. 1995)(even assuming cause for procedural default due to defense

[32] Compare *Custis, supra*, holding the unless the Sixth Amendment right to counsel was violated, the due process clause did not allow collateral attacks on prior convictions at sentencing.

counsel's deficient performance in failing to object to prior convictions on basis there was no affirmative showing that defendant was represented by counsel, prisoner failed to demonstrate prejudice prong need for habeas review).

The *Femia* decision obviously recognized that a federal court *ought*, as a general rule, afford a petitioner an opportunity to explain his default. However, the *Femia* Court further recognized that there may be circumstances where affording such an opportunity results in a waste of judicial resources. The Second Circuit cautioned its holding, noting that "[s]ummary notice that a petition abuses the writ, and that the burden has shifted to the petitioner to show why the petition should not be dismissed, will not pass muster." *Id.*, 47 F. 3d at 523. On the other hand, the Court recognized a limited exception to the notice requirement "when the ground for dismissal is lack of actual prejudice...Unlike a cause determination, a finding of actual prejudice is one made on the merits based on the record...Moreover, notice serves little purpose when only prejudice is at issue. If the petition liberally construed admits of no possibility of actual prejudice, notice will not cure the defect." *Id.*, 47 F. 3d at 524.

In contrast to the actual prejudice analysis, the Second Circuit recognized that "[c]ause is quite a different manner...Such factors are usually outside the record and may be exclusively within the petitioner's knowledge, and thus will only come to light if properly asserted by the petitioner." *Id.* (citations omitted). In *Coleman, supra,* at 753, this Court stated "cause" must be "something external to the petitioner, something that cannot be attributed to him..."

The *Femia* Court reached its holding based upon the second prong of actual prejudice, finding that "[w]hen a prisoner, who may be unlearned in law and unskilled in pleading, offers a cognizable claim in a second or successive petition that appears to demonstrate actual prejudice, but fails to address adequately the issue of cause, prior notice is essential. If the petition, when viewed in the context of all prior proceedings, reveals no actual prejudice that would entitle the petitioner to relief, even if cause could be shown, a district court may dismiss the petition sua sponte..." *Id.*, 47 F. 3d at 524-525.

Given this Honorable Court's decision in *Custis*, an issue which the Fifth Circuit itself had requested both sides brief and orally argue, it is evident that even if petitioner had established cause for the default, within the confines of *Custis,* the Fifth Circuit could have properly found that the record before it clearly indicated no actual prejudice. [33] In order to succeed in a collateral attack under *Custis* in federal habeas review that was otherwise barred by procedural default, the state prisoner would have to show cause and actual prejudice. *See e.g.* Smith, *supra,* note 18 at 1340. Because the record shows no actual prejudice, the Fifth Circuit's summarily barring habeas relief was proper.

A. Petitioner accuses the Fifth Circuit of "sandbagging" him when, to the contrary, his poorly articulated and newly raised claims, in effect, "sandbagged" the state and lower federal courts from resolving the constitutional claims in the first instance.

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[33] *See e.g.* Smith, *supra,* note 18 at 1325-26, finding that *Custis* is "best viewed as part of the Court's campaign to enhance the speed, efficiency, and finality of justice by impeding defendant's ability to file repeated and protracted appeals."

Petitioner argues that the actions of the Fifth Circuit "sandbagged" him by invoking procedural default post-oral argument on the *Custis* issue by the Court rendering its opinion that petitioner was procedurally defaulted, and thereby, finding that the Court was foreclosed from addressing the merits. The petitioner further argues he was "sandbagged" by the Court's failure to allow petitioner the opportunity to demonstrate cause and actual prejudice for the default. *Brief For Petitioner* at 12. *See also Thomas v. Arn*, 474 U.S. 140, 147-155 (1985) (affirming Sixth Circuit's procedural rule requiring the filing of objections to the federal magistrate's report; otherwise, appellate review is precluded on any issue not contained in objections to prevent litigant from "sandbagging" district judge by failing to object and then appealing. Otherwise, court of appeal forced to consider claims never reviewed by the district court).

Unlike *Esslinger, supra,* wherein the magistrate *sua sponte* raised procedural bar of the custodial state of Alabama despite the State of Alabama's express waiver, and thereafter, held an evidentiary hearing, which resulted in a recommendation that the bar as an alternative means for dismissal, neither party to this litigation expected that a procedural bar evolving from the law of Mississippi would ultimately derail petitioner's federal habeas petition. However, the Fifth Circuit's course of action does not mean that petitioner was treated in a fundamentally unfair way. *See Michel v. Louisiana*, 350 U.S. 91, 97 (1956)("it is beyond question that under the Due Process Clause of the Fourteenth Amendment [a state] may attach reasonably time limitations to the assertion of federal constitutional rights.")

Quite notably, petitioner has not attempted to demonstrate in his brief to this Honorable Court what response *he would have made to the Fifth Circuit had the Court required that he establish cause and actual prejudice for the default.* Petitioner makes fleeting references to the claimed error but gives no analysis or authorities to support the assertion that "[t]he majority's conclusion that the Petitioner did not demonstrate the absence of a procedural bar or cause and prejudice for his default - when he had no reason for doing so based on the State's inaction and no notice of the need to make such a showing by the court of appeals - is contrary to the teaching of this court regarding the nature of that showing and is fundamentally unfair." *Brief For Petitioner* at 12. What would be the point of allowing a petitioner the opportunity to demonstrate cause, assuming he could, and knowing that the record did not support a finding of actual prejudice or a "fundamental miscarriage of justice"? *See Bannister, supra,* 100 F. 3d at 617, wherein the Eighth Circuit recognized that a state prisoner failed to demonstrate actual innocence to forgive procedural default, and a remand to such a determination was not necessary. Further, *Bannister* recognized that a state prisoner's claim that the district court was "simply incorrect", as Trest maintains in his brief to this Court, was not a sufficient allegation of cause for a procedural default.

Furthermore, the extensive procedural history of Trest's dealings with state and federal courts leads one to conclude that this state inmate was no stranger to the courthouse or to habeas corpus proceedings. He had ample opportunities to redress his constitutional grievances beginning with a contemporaneous objection through counsel at his trial, and continuing through his

direct review of his conviction and sentence and his first application for state post conviction relief on February 26, 1991. *See* App. F at 29a-40a for outline of complete procedural history. To foreclose a habeas petitioner at this late hour clearly cannot be deemed fundamentally unfair.

CONCLUSION

For the reasons herein, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDIX A

(Letterhead Omitted In Printing)

May 27, 1997

James M. Bullers, Esq.
District Attorney, 26th Judicial District
P. O. Box 69
Benton, Louisiana 71006

Re: 96-7901 - Richard F. Trest v. Burl Cain, Warden

Dear Mr. Bullers:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition."

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Although this case will not be calendared for oral argument this Term please note that

requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK
/s/Sandy Nelson
SANDY NELSON
Merits Clerk
(202) 479-3032

Enclosures

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Amendment V Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * *

Amendment XIV Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

(In pertinent part)

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

LOUISIANA CODE OF CRIMINAL PROCEDURE

C.Cr.P. Art. 841 Bill of exceptions unnecessary; objections required - "as it existed in 1979"

An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court, the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

The requirement of an objection shall not apply to the court's ruling on any written motion.

Amended by Acts 1974, No. 297, § 1.

C.Cr.P. Art. 912.1 Right of appeal and application for review; defendant

A. The defendant may appeal to the supreme court from a judgment in a capital case in which a sentence of death actually has been imposed.

B. The defendant may appeal to the court of appeal from a judgment in a criminal case triable by jury, except as provided in Paragraph A of this Article.

C. (1) In all other cases not otherwise provided by law, the defendant has the right of judicial review by application to the court of appeal for a writ of review. This application shall be accompanied by a complete record of all evidence upon which the judgment is based unless the defendant intelligently waives the right to cause all or any portion of the record to accompany the application.

(2) An application for review by the defendant shall not suspend the execution of sentence, unless the defendant is admitted to postconviction bail. *Added by Acts 1974, Ex. Sess., No. 28, § 1, eff. Jan. 1, 1975. Amended by Acts 1980, No. 516, § 1, eff. July 1, 1982; Acts 1986, No. 443, § 1.*

(Historical And Statutory Notes Omitted In Printing)

C.Cr.P. Art. 924 Application for post conviction relief

An application for post conviction relief is a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside.

"Custody" as used in this Title means detention or confinement, or probation or parole supervision, after sentence following conviction for the commission of an offense. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 924.1 Effect of appeal

An application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending. *Added by Acts 1980, No. 429, § 1, eff. Jan.1, 1981.*

C.Cr.P. Art. 925 Venue

Applications for post conviction relief shall be filed in the parish in which the petitioner was convicted. *Added by Acts 1980, No. 429, § 1, eff. Jan 1, 1981.*

C.Cr.P. Art. 926 Petition

A. An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted. A copy of the judgment of conviction and sentence shall be annexed to the petition, or the petition shall allege that a copy has been demanded and refused.

B. The petition shall allege:

(1) The name of the person in custody and the place of custody, if known, or it not known, a statement to that effect;

(2) The name of the custodian, if known, or if not known, a designation or description of him as far as possible;

(3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;

(4) A statement of all prior applications for writs of habeas corpus or for post conviction relief filed by or on behalf of the person in custody in connection with his present custody; and

(5) All errors known or discoverable by the exercise of due diligence.

C. The application shall be signed by the petitioner and be accompanied by his affidavit that the allegations contained in the petition are true to the best of his information and belief.

D. The petitioner shall use the uniform application for post conviction relief approved by the Supreme Court of Louisiana. If the petitioner fails to use the uniform application, the court may provide the petitioner with the uniform application and require its use.

E. Inexcusable failure of the petitioner to comply with the provisions of this Article may be a basis for dismissal of his application. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 927 Procedural objections; answer

A. If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections he may have, or an answer on the merits if there are no procedural objections, within a specified period not in excess of thirty days. If procedural objections are timely filed, no answer on the merits of the claim may be ordered until such objections have been considered and rulings thereon have become final.

B. In any order of the court requiring a response by the district attorney pursuant to this Article, the court shall render specific rulings dismissing any claim which, if established as alleged, would not entitle the petitioner to relief, and shall order a response only as to such claim or

claims which, if established as alleged, would entitle the petitioner to relief.

C. If the court orders an answer filed, the court need not order production of the petitioner except as provided in Article 930. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981. Amended by Acts 1990, No. 523, § 1.*

C.Cr.P. Art. 928 Dismissal upon the pleadings

The application may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle the petitioner to relief. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 929 Summary disposition

A. If the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court may grant or deny relief without further proceedings.

B. For good cause, oral depositions of the petitioner and witnesses may be taken under conditions specified by the court. The court may authorize requests for admissions of fact and of genuineness of documents. In such matters, the court shall be guided by the Code of Civil Procedure. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930 Evidentiary hearing

A. An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 and 929. The petitioner, in absence of an express waiver, is entitled to be present at such hearing, unless the only evidence to be received is evidence as permitted pursuant to Subsection B of this Section, and the petitioner has been or will be provided with copies of such evidence and an opportunity to respond thereto in writing.

B. Duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of facts may be received in evidence.

C. No evidentiary hearing on the merits of a claim shall be ordered or conducted, nor shall any proffer of evidence be received over the objection of the respondent, and no ruling upon procedural objections to the petition shall purport to address the merits of the claim over the objection of the respondent, unless the court has first ruled upon all procedural objections raised by the respondent, and such rulings have become final. Any language in a ruling on procedural objections raised by the respondent which purports to address the merits of the claim shall be deemed as null, void and of no effect. *Added by Acts 1980, No. 429, § 1, eff. January 1, 1981. Amended by Acts 1990, No. 523, § 1.*

C.Cr.P. Art. 930.1 Judgment granting or denying relief under Articles 928, 929, and 930

A copy of the judgment granting or denying relief and written or transcribed reasons for the judgment shall be furnished to the petitioner, the district attorney, and the custodian. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.2 Burden of proof

The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.3 Grounds

If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

(2) The court exceeded its jurisdiction;

(3) The conviction or sentence subjected him to double jeopardy;

(4) The limitations on the institution of prosecution has expired;

(5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or

(6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.4 Repetitive applicants

A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.

B. If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief.

C. If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court may deny relief.

D. A successive application may be dismissed if it raises a new or different claim.

E. A successive application may be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application.

F. If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981*

C.Cr.P. Art. 930.5 Custody pending retrial; bail

If a court grants relief under an application for post conviction relief, the court shall order that the petitioner be held in custody pending a new trial if it appears that there are legally sufficient grounds upon which to reprosecute the petitioner.

In such a case, the petitioner shall be entitled to bail on the offense as though he has not been convicted in the offense. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.6 Review of trial court judgments

A. The petitioner may invoke the supervisory jurisdiction of the court of appeal if the trial court dismisses the application or otherwise denies relief on an

application for post conviction relief. No appeal lies from a judgment dismissing an application or otherwise denying relief.

B. If a statute or ordinance is declared unconstitutional, the state may appeal to the supreme court. If relief is granted on any other ground, the state may invoke the supervisory jurisdiction of the court of appeal.

C. Pending the state's application for writs, or pending the State's appeal, the district court or the court of appeal may stay the judgment granting relief. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981. Amended by Acts 1985, No. 233, § 1.*

C.Cr.P. Art. 930.8 Time limitations; exceptions; prejudicial delay

A. No application for post conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than three years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his attorney.

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

(3) The application would already be barred by the provisions of this Article, but the application is filed on or before October 1, 1991.

(4) The person asserting the claim has been sentenced to death.

B. An application for post conviction relief which is timely filed, or which is allowed under an exception to the time limitation as set forth in Paragraph A of this Article, shall be dismissed upon a showing by the state of prejudice to its ability to respond to, negate, or rebut the allegations of the petition caused by events not under the control of the state which have transpired since the date of original conviction, if the court finds, after a hearing limited to that issue, that the state's ability to respond to, negate, or rebut such allegations has been materially prejudiced thereby.

C. At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for post conviction relief. *Added by Acts 1990, No. 1023, § 1 eff. Oct. 1, 1990.*

APPENDIX D

LOUISIANA REVISED STATUTES

LA.R.S. 14:64 Armed robbery - (West 1978)

A. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence.

Amended by Acts 1958, No. 380, § 1; Acts 1962, No. 475, § 1; Acts 1966, Ex.Sess., No. 5, § 1.

La.R.S. 15:529.1 (West 1979) Sentences for second and subsequent offenses; certificate of warden as evidence

A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government or country of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state,

upon conviction of said felony, shall be punished as follows:

(1) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction;

(2) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then,

(a) The person shall be sentenced to imprisonment for any term not less than one-half the longest possible sentence prescribed for a first conviction; or

(b) If the third felony and each of the two prior felonies involved a violation of R.S. 14:34, R.S. 14:62.1, R.S. 14:65, R.S. 14:110(B), or of any crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of this natural life, without benefit of parole, probation or suspension of sentence.

(3) If the fourth or subsequent felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then, the person shall be sentenced to imprisonment for the fourth subsequent felony for a determinate term not less than the longest

prescribed for a first conviction and not more than his natural life and in no case less than twenty years.

B. It is hereby declared to be the intent of this Section that an offender need not have been adjudged to be a second offender in a previous prosecution in order to be charged as, and adjudged to be, a third offender, or that an offender have been adjudged in a prior prosecution to be a third offender in order to be convicted as a fourth offender in a prosecution for a subsequent crime. Provided, however, that the offender shall be deemed a second offender only if the crime resulting in the second conviction shall have been committed after his first conviction; that one shall be deemed a third offender under this Section only if the crime resulting in the third conviction shall have been committed after his conviction for a crime which in fact caused him to be a second offender, whether or not he was adjudged to be a second offender in the prior instance; and that one shall be deemed to be a fourth offender under this Section only if the crime resulting in the fourth conviction shall have been committed after his conviction for a crime which in fact caused him to be a third offender, whether or not he was adjudged to be a third offender in the prior instance.

C. This section shall not be applicable in cases where more than five years have elapsed since the expiration of the maximum sentence, or sentences, of the previous conviction, or convictions, and the time of the commission of the

last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall be included in the computation of any of said five year periods.

D. If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony under the laws of this state, or has been convicted under the laws of any other state or of the United States; or any foreign government or country of a crime, which, if committed in this state would be a felony, the district attorney of the parish in which subsequent conviction was had may file an information accusing the person of a previous conviction. Whereupon the court in which the subsequent conviction was had shall cause the person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall require the offender to say whether the allegations are true. If he denies the allegation of the information or refuses to answer or remains silent, his plea or the fact of his silence shall be entered on the record and the judge shall fix a day to inquire whether the offender has been convicted of a prior felony or felonies, as set forth in the information. If the judge finds that he has been convicted of a prior felony or felonies, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has

been so convicted, the court shall sentence him to the previous sentence if already imposed, deducting from the new sentence the time actually served under the sentence so vacated.

E. Whenever it shall become known to any superintendent or prison, probation, parole, police, or other peace officer, that any person charged with or convicted of a felony has been previously convicted within the meaning of this Section, he shall immediately report the fact to the district attorney of the parish in which the charge lies, or the conviction has been had.

F. The certificates of the warden or other chief officer of any state prison, or of the superintendent or other chief officer of any penitentiary of this state or any other state of the United States, or of any foreign country, under the seal of his office, if he has a seal, containing the name the name of the person imprisoned, the photograph, and the finger prints of the person as they appear in the records of his office, a statement of the court in which a conviction was had, the date and time of sentence, length of time imprisoned, and date of discharge from prison or penitentiary, shall be prima facie evidence on the trial of any person for a second and subsequent offense of the imprisonment and of the discharge of the person, either by a pardon or expiration of his sentence, as the case may be under the conviction stated and set forth in the certificate. Acts 1956, No. 312, §§ 1-4, as amended Acts 1958, No. 469, § 1.

APPENDIX E

MISSISSIPPI CODE 1972 ANNOTATED

§ 99-39-5 Grounds for relief; time limitations

(1) Any prisoner in custody under sentence of a court of record in the State of Mississippi who claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That his plea was made involuntarily;

(g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(h) That he is entitled to an out-of-time appeal; or

(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion,

petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal.

(2) A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three(3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this chapter shall be subject to the provisions of Section 99-19-42.

APPENDIX F

UNITED STATES CODE
TITLE 28

(Law prior to amendment in relevant part)

§ 2254. State custody; remedies in Federal courts

...**(b)** An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(June 25, 1948, c. 646, 62 Stat. 967; November 2, 1966; Pub.L. 89-711, §2, 80 Stat. 1105.)

UNITED STATES CODE

TITLE 28

(Law post amendment in relevant part)

§ 2254. State custody; remedies in Federal courts

...**(b)(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(As amended Apr. 24, 1996, Pub.L.104-132, Title I, § 104, 110 Stat. 1218.)

APPENDIX G

OUTLINE OF RICHARD FRANKLIN TREST'S PROCEDURAL HISTORY*

12/26/78	Petitioner committed offense of armed robbery.
1/5/79	Grand jury indicted Petitioner for armed robbery.
3/29/79	Petitioner convicted of armed robbery in 26th Judicial District, Parish of Bossier, State of Louisiana, following a jury trial that commenced on March 26, 1979.
4/19/79	State filed habitual offender bill of information against petitioner based on five prior 1976 Mississippi felony guilty pleas to the felony offense of burglary.
4/24/79	Petitioner appeared in court on bill and entered a not guilty plea.
6/8/79	Habitual offender hearing: • Petitioner found to be a habitual offender under La. R.S. 15:529.1 after his motion to quash the habitual offender bill filed by trial counsel S. Patrick Phillips was denied.

* The respondent's Statement Of The Case has described in great detail Trest's procedural history in state and federal court. *See, supra*, 3-16. This summary chart has been complied for the convenience of the Court.

- Petitioner was sentenced to 35 years at hard labor without the benefit of probation, parole or suspension under La. R.S. 14:64 (West 1978).

- Petitioner through counsel Phillips, filed a motion to appeal in which he never constitutionally challenged the 1976 Mississippi guilty pleas used to enhance his Louisiana sentence.

7/18/79 Petitioner's counsel filed a motion for extension of time for specification of errors.

8/17/79 Specifications of errors filed, none of which raise constitutional challenge to the Mississippi convictions. Those assigned errors were:

- Testimony of person not a witness to the crime of armed robbery;

- Recessing court at 3:38 p.m. to allow state to secure witnesses;

- Witness identification of petitioner;

- Witness testimony of petitioner's alleged other offenses; and

- Refusal to grant motion for mistrial.

11/21/79 Petitioner filed appeal brief with Louisiana Supreme Court.

1/21/80 District Attorney filed appellate brief with Louisiana Supreme Court.

2/6/80 Louisiana Supreme Court affirmed trial court's determinations and affirmed petitioner's conviction and sentence.

2/21/80 Petitioner requested rehearing with Louisiana Supreme Court.

3/3/80 Louisiana Supreme Court denied rehearing request.

2/26/81 Petitioner filed a his first *pro se* petition for post conviction relief entitled *Petition For Writ Of Habeas Corpus* with the trial court, which did not set forth a challenge to the Mississippi convictions. The assigned errors were:

- Jury instruction relieved the state of burden of proof; and

- Closing argument shifted the burden of the state to prove each element of the crime.

3/2/81 Trial court denied relief; judgment became final without further review.

10/21/83 Petitioner filed a second *pro se* petition for

post conviction relief entitled *Application For Writ Of Habeas Corpus* and supporting memorandum, neither of which included a challenge to the Mississippi convictions. The assigned errors were:

- Ineffective assistance of counsel;
- Testimony of other crimes evidence;
- Jury charges shifted burden of proof of the state raised for second time;
- Testimony of detective who allegedly violated sequestration rule;
- More severe sentence imposed because petitioner opted to trial; and
- Requested inspection for error patent.

4/18/84 After the District Attorney filed answer to October 21, 1983 application, trial court denied relief.

5/7/84 Petitioner filed an application for rehearing with the trial court which was denied.

9/6/84 Petitioner filed a petition for review in Louisiana Supreme Court along with a supporting brief, which did not challenge constitutionality of Mississippi convictions.

4/1/85 Louisiana Supreme Court denied supervisory writs; judgment became final when no further review was sought.

1/17/90* Petitioner filed a third *pro se* application for post conviction relief entitled *Motion to Correct Illegal Sentence;* the application alleged that "[t]he entire multiple offender proceedings were in violation of L.S.A. R.S. 15:529.1.". The list of claims were as follows:

1. The trial court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.

2. The trial court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information and as to a "formal hearing".

3. The trial court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.

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* For the first time petitioner challenges Mississippi convictions through a memorandum expanding his claim no. 7 by stating in this application that illegal evidence was used at his habitual offender hearing to add his "7B claim".

4. The trial court erred by allowing defense counsel to enter the not guilty plea to said charge.

5. The trial court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions.

6. There was insufficient evidence produced during multiple offender trial to show whether or not the prior felony conviction ended in a pardon.

7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.

8. The trial court erred by ordering said second offender sentence to be without parole.

9. The trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

As support for the nine claims, petitioner attached a supporting memorandum which expanded claim number 7 to parts A and B. Petitioner's "7B claim" argued:

- That the Mississippi guilty pleas were invalid because he was not informed of three factors: "right" to appeal, "right"

to counsel on appeal and maximum sentence that could be imposed.

3/26/90 Without response by District Attorney, trial court denied relief without addressing "7B claim".

7/13/90 Petitioner filed application for *Writ of Supervisory and/or Review* with the Louisiana Supreme Court and attached thereto the same post conviction application and supporting memorandum that he had filed with the trial court on January 17, 1990. Petitioner did not complain that the trail court had not addressed his "7B claim".

5/17/91 Louisiana Supreme Court denied review of this application on January 17, 1990. Judgment becomes final with no further review sought.

9/30/91 Petitioner filed a *pro se* petition under 28 § U.S.C. 2254 for a federal writ of habeas corpus with the United States District Court for the Western District of Louisiana, Shreveport Division. This petition was identical to the post conviction application filed with the trial court on 1/17/90. Petitioner again did not complain that the trial court had not addressed his "7B claim".

1/9/92 District Attorney filed an answer to application for a federal writ of habeas corpus conceding petitioner's exhaustion of state court remedies; District Attorney addressed claim number 7 contained in the application but did not address the "7B claim" in Trest's supporting memorandum.

1/24/92 Petitioner filed a motion in traverse to state's answer to application for federal writ of habeas corpus, reasserting the same claims in this application without mentioning the "7B claim".

2/2/94 U.S. magistrate issued Report And Recommendation regarding the application for federal habeas corpus, concluding that the State of Louisiana had complied with all due process requirements, but did not address petitioner's "7B claim" concerning the alleged invalidity of the Mississippi convictions.

2/18/94 Petitioner filed *Objections to Magistrate's Report And Recommendation*, asserting for the first time two objections:

That the federal magistrate had not addressed the merits of his "7B claim" based upon the Mississippi trial court's failure to advise him of his alleged right to appeal, alleged right to counsel on appeal, and maximum sentence to be imposed at

time of 1976 guilty pleas. Petitioner also adds for the first time a claim under Boykin v. Alabama that the guilty pleas were not intelligently and voluntarily made and attached the plea colloquy in support. The District Attorney did not respond to the petitioner's objections.

5/13/94 U.S. District Court adopted the magistrate's Report and Recommendation, which denied the petitioner's application for federal habeas relief. The order recognized petitioner's objections without further comment.

5/26/94 Petitioner filed with the U.S. District Court for the Western District of Louisiana, Shreveport Division, a *Notice of Intent to Appeal* along with a petition for *Certificate Of Probable Cause To Appeal* to the Fifth Circuit Court of Appeals.

6/20/94 U.S. District Court denied the petition for *Certificate of Probable Cause*.

11/7/94 Petitioner filed a fourth *pro se* application for post conviction relief entitled *Petition for Habeas Corpus* with the Louisiana trial court in Bossier Parish, 26th Judicial District, urging equal protection violations and ineffective assistance of counsel under

alleged discrimination in the selection process of grand jury foreman.

11/14/94 District Attorney filed an answer and supplemental answer to application for post conviction relief; lodged procedural bar pursuant to La.C.Cr.P. Art. 930.8.

11/17/94 Trial court denied relief.

11/18/94 Petitioner filed *Traverse In Oppostion To The State's Response* which trial court denied and referred back to November 17, 1994 reasons for judgment.

12/29/94 Petitioner filed an application for a writ of review with the Louisiana Supreme Court, asserting the same claims contained in November 17, 1994 post conviction application to the trial court.

08/15/94 Petitioner filed an appeal from the decision of the United States District Court for the Western District of Louisiana, Shreveport Division, with the United States Court of Appeals, Fifth Circuit. In this appeal he asserted the same claims as he had previously raised in his January 17, 1990 state post conviction relief application and his September 30, 1991 federal habeas. Petitioner did not re-argue his claim that the "7B claim" was ignored or raise his Boykin claim regarding the voluntariness of his Mississippi guilty pleas.

6/26/95 Following a two-page response by the District Attorney which simply incorporated the State's previous answer filed January 9, 1992, Federal Public Defender, Rebecca Hudsmith, was appointed by the Fifth Circuit as counsel for petitioner. Both the District Attorney and petitioner were ordered to submit supplemental briefs addressing Custes v. United States, 511 U.S. 485 (1994).

12/7/95 Parties orally argue Custis issue to Fifth Circuit.

9/17/96 Fifth Circuit held that it was precluded from reviewing the merits of petitioner's claims because those claims were procedurally barred from federal court scrutiny.

10/1/96 Petitioner filed a petition for rehearing and petition for rehearing en banc with the Fifth Circuit Court of Appeals.

10/29/96 Fifth Circuit denied both rehearing and rehearing en banc.

11/15/96 Louisiana Supreme Court denied the application for a writ of review filed on December 29, 1994, regarding alleged racial discrimination in selection of grand jury forepersons. Judgment became final when no further review sought.

1/27/97	Petitioner applied to U.S. Supreme Court for a writ of certiorari, which was granted as to Question No. 1 as raised by petitioner.